91-430

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

John G. Wellman, Sr., as Debtor-in-possession,

Petitioner,

vs.

Arthur O. Wellman, Jr.; Edward R. Sacks; and
Wellman, Incorporated, Successor to Sacks Textile Associates, Incorporated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TURNER, PADGET, GRAHAM & LANEY, P.A.
Michael S. Church, Esquire
Counsel of Record
Ronald E. Boston, Esquire
R. Wayne Byrd, Esquire
1901 Main Street, 17th Floor
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200
COUNSEL FOR PETITIONER

QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals correctly determined that the petitioner lacked standing to maintain an action under 11 U.S.C. §§ 548 and 550.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

John G. Wellman, Sr., as Debtor-in-possession,

Petitioner,

vs.

Arthur O. Wellman, Jr.; Edward R. Sacks;and
Wellman, Incorporated, Successor to Sacks Textile Associates, Incorporated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John G. Wellman, as debtor-in-possession petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the

Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 933 F.2d 215, and reprinted at Pet. App A1. The order of the United States District Court for the District of South Carolina is unpublished, and reprinted at Pet. App. A23.

JURISDICTION

The Court of Appeals entered judgment on May 13, 1991, and denied petitioner's petition for rehearing and suggestion for rehearing en banc on June 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are sections 548 and 550 of the

Bankruptcy Code, 11 U.S.C. §§ 548 and 550, which are reprinted in Pet. App. A86.

STATEMENT

This case involves the Debtor-in-possession in a Chapter 11 Reorganization proceeding who seeks recovery of property which he voluntarily transferred within one year before the filing of his bankruptcy petition. The Court of Appeals found that the Debtor-in-possession did not have standing to maintain the action under the fraudulent conveyance provisions of the Bankruptcy Code.

1. Prior to October of 1983, John G. Wellman, Sr., and his brother, Arthur Wellman, and their immediate families owned all of the stock in Wellman, Inc., a manufacturer of synthetic fibers. Pet App. A5. In 1983 John G. Wellman, Sr., was in desperate financial straits as a result of

his involvement in Lakewood Plantation Company, Inc., a pork processing enterprise. Pet App. A7 A proposed sale of Wellman, Inc., by both brothers to Allied Corporation was not consummated, and Arthur Wellman suggested that John sell his stock to Edward Sacks. Sacks eventually purchased the stock in October of 1983, and he and Arthur Wellman continued to operate Wellman, Inc., until 1985 when they sold it in a leveraged buyout for a substantial profit far greater than that paid to John Wellman for the stock. Pet App. A7

John Wellman filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, et seq., in August of 1984. As Debtor-in-possession he continued in possession of assets of the estate with many of the powers and duties of a trustee in bankruptcy. See 11 U.S.C.

§ 1107. In April of 1986 the United States Bankruptcy Court for the District of South Carolina confirmed a Plan of Reorganization filed by John Wellman as Debtor-in-possession. The Plan provided for payment of the full allowed amount of all claims with the exception of the claims of the Citizens and Southern National Bank, the Travelers Insurance Company, and the Budd Leasing Corporation. Pet App. A9. These creditors were given non-recourse notes totalling $600,000 to be paid from any recovery in the within action and another which was later dismissed. Pet App. A9. The remaining property of the estate was vested in the petitioner.

2. Petitioner initiated this action January 3, 1986, alleging that the transfer of his stock in Wellman, Inc., to respondents was a fraudulent transfer

under section 548 of the Bankruptcy Code, 11 U.S.C. § 548, and seeking recovery of the stock or its value under section 550, 11 U.S.C. § 550, together with pendant state claims for breach of fiduciary duty, and civil conspiracy. The district court granted respondents summary judgment on all causes of action finding that any recovery would benefit the petitioner and not the bankruptcy estate and that the petitioner, therefore, did not have standing to maintain the action. The Fourth Circuit affirmed the district court likewise finding that the action was not for the benefit of the estate.

In affirming the Fourth Circuit concluded that a recovery in the action would not benefit the bankruptcy estate as required by 11 U.S.C. § 550. The court reviewed the facts and concluded that C&S, the Travelers, and Budd would have

accepted the plan without the notes since they were non-recourse and would not be paid if there was no recovery in the within action. The court further noted that the reorganization plan vested John Wellman with cash and property valued in excess of the amount of the notes given creditors. Pet. App. A19-21.

The panel denied petitioner's petition for rehearing and the Fourth Circuit denied his suggestion for rehearing en banc. Pet. App. A84.

REASONS FOR GRANTING THE WRIT

This case presents a single central issue as to the standing of a debtor-in-possession to bring an avoidance action in a chapter 11 proceeding under the Bankruptcy Code, Title 11 United States Code. While the courts addressing this issue have uniformly held that such an

action may not be maintained for the sole benefit of the debtor, and have generally applied a case by case, factually specific analysis of the benefit to creditors, this approach as applied by the Fourth Circuit in this case is inconsistent with results in factually indistinguishable cases. In affirming the grant of summary judgment against the petitioner in this case the Fourth Circuit has additionally construed the facts and the inferences therefrom in the light most favorable to the respondents contrary to the accepted and usual course of judicial proceedings. Hall v. Diamond M. Company, 732 F.2d 1246 (5th Cir. 1984).

The Fourth Circuit in this case correctly noted that implicit in the language of section 550 of the Bankruptcy Code, 11 U.S.C. § 550 is the requirement that avoidance actions be for the benefit

of the bankruptcy estate. This requirement was also recognized in actions under the Bankruptcy Act in a line of cases beginning with Whiteford Plastics Co. v. Chase Nat'l Bank, 179 F.2d 582 (2d Cir. 1950), prior to the enactment of the Bankruptcy Code. The analysis of the benefit to the bankruptcy estate undertaken by the Fourth Circuit in this case was, however, inconsistent with that of the majority of the courts addressing the issue and inconsistent with the provisions of the Bankruptcy Code.

In Whiteford the Chapter XI debtor attempted to avoid an improperly perfected security interest of a creditor in steam generators. The debtor's plan of arrangement, which was confirmed by the bankruptcy court, however, made no provision for the inclusion of any benefit derived from the avoidance of the security

interest. Since the plan contained no provision for the use of the value received by the Debtor in payments to creditors under the plan, the Second Circuit concluded that the avoidance would benefit <u>only</u> the debtor.

Subsequent cases have concluded that the benefit to the creditors of the bankruptcy estate need not be direct. <u>City National Bank & Trust Co. v. Oliver</u>, 230 F.2d 686 (10th Cir. 1956); <u>In re Tennessee Wheel & Rubber Co.</u>, 64 Bankr. 721 (Bankr. MD. Tenn. 1986), <u>aff'd</u>, 75 B.R. 1 (M.D. Tenn. 1987). Additionally, other courts have held that the fact that the debtor-in-possession will not be a direct beneficiary of an avoidance action will not be fatal to the action. <u>In re Sweetwater</u>, 884 F.2d 1323 (10th Cir. 1989).

In this case the debtor's plan of

reorganization confirmed by the bankruptcy court provided that three creditors of the estate would receive non-recourse notes payable out of any recovery in the pending avoidance actions to be prosecuted by the petitioner. The Fourth Circuit, however, concluded the fact that these notes, totalling $600,000 plus interest at the rate of 10% per annum, would be paid from any recovery in the avoidance action did not constitute a benefit to the bankruptcy estate. The Court reached this result by inferring that the three creditors, The Citizens and Southern National Bank, the Travelers Insurance Company, and the Budd Leasing Company would have accepted the Plan without having been given the notes. Pet. App. A20. The court reached this inference from the fact that the notes were non-recourse and the debtor controlled the prosecution of the claims

securing the notes and from the fact that the debtor received property from the bankruptcy estate which he valued at an amount several times the amount of the notes.

The court reasoned that the creditors could simply have been paid from the property retained by the debtor and that there was nothing to prevent the petitioner from dismissing the avoidance actions and that the creditors, therefore, could not have placed much value in the notes. In reaching its conclusion the Fourth Circuit construed these facts and the inferences therefrom against the petitioner and ignored more likely inferences.

The Bankruptcy Code requires the debtor-in-possession to carry out the implementation of the plan of reorganization, 11 U.S.C. § 1142, and the

debtor-in-possession stands in a fiduciary relationship to his creditors, Matter of Parker Grande Development, Inc., 64 B.R. 557, 561 (Bankr. S.D. Ind. 1986). The petitioner was required to pursue a recovery in the avoidance action on behalf of the creditors, and thus, no inference can arise from the fact that the petitioner controlled the litigation.

With respect to the property retained by the debtor, there is a reasonable inference that the creditors were of the opinion that the value, which could have reasonably been realized upon liquidation of that property, was less than the amount of the notes given them. Certainly such an inference is as likely as the inference that these creditors agreed to accept less than the amount of their claims and additionally agreed to become a part of a plan designed to obtain a windfall for the

debtor-in-possession. This is especially true in light of 11 U.S.C. § 1129(a)(1),(2), and (3) which provide that the bankruptcy court shall not confirm a plan unless:

> (1) The plan complies with the applicable provisions of this title.
>
> (2) The proponent of the plan complies with the applicable provisions of this title.
>
> (3) The plan has been proposed in good faith and not by any means forbidden by law.

Section 1141 of the Bankruptcy Code, 11 U.S.C. § 1141 provides that confirmation of the plan vests the property of the estate in the debtor free and clear of the claims of creditors unless otherwise provided for in the plan of reorganization. The non-recourse nature of the notes is in accord with this section.

The case presented here is factually indistinguishable from that in In re Sweetwater, 884 F.2d 1323 (10th Cir. 1989). In Sweetwater the debtor had insufficient cash to pay the administrative expense claims upon confirmation. These creditors agreed to accept less favorable treatment of their claims by accepting an interest in a fund of cash and assets which included "the potential proceeds from litigation or settlement" with the defendants in certain avoidance actions. Id. at 1323. Pursuant to the plan the debtor was to receive any surplus in excess of the amount necessary to pay these claims. Id. at 1325. On these facts the Tenth Circuit concluded that the benefit to the administrative expense creditors was sufficient benefit to the estate to provide standing to the representative of the estate to pursue the

claims. The result of the Fourth Circuit in this case is in direct conflict with the result in Sweetwater.

Chapter 11 debtors and their creditors, in their efforts to resolve disputes between the parties in interest, provide for the payment of claims, and also provide for the retention of sufficient assets to effectuate the reorganization purposes of Chapter 11 often reach agreements relating to the payment of claims from certain assets while other assets are retained by the debtor or distributed to other interests of the bankruptcy estate. To later question whether creditors' claims might have been better paid from another asset of the bankruptcy estate or to question whether a creditor would have accepted a plan without receiving any benefit from a certain source, and to deny creditors an

opportunity to receive the benefit provided for it by a court approved bankruptcy plan, will undoubtedly have a chilling effect on such agreements.

Implicit in the Fourth Circuit's decision is the fact that the amount received by the debtor for his stock was substantially less than its value. In its effort to avoid a perceived windfall to the debtor the Fourth Circuit would sacrifice the interests of the three creditors who received notes to be paid from any recovery by the debtor. The respondents obtained the stock in question from the debtor within one year of the filing of his bankruptcy petition at a time when he was under economic duress. The opinion of the Fourth Circuit and the district court would seem to concede that the respondents obtained the stock for a value that was unreasonably small. A

recovery by the debtor would result in payment of creditor claims, a direct benefit to those creditors of the estate, in accordance with a plan of reorganization approved by the bankruptcy court. The inquiry of the district court and the Fourth Circuit into the standing of the petitioner to maintain the action should have gone no further. Considerations of a potential windfall to the debtor should be left to Congress in its enactment of the Bankruptcy Code and the priorities of claims thereunder.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Michael S. Church
Counsel of Record
R. Wayne Byrd
Ronald E. Boston
TURNER, PADGET, GRAHAM & LANEY, P.A.
1901 Main Street, 17th Floor
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200

COUNSEL FOR PETITIONER

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1403

JOHN G. WELLMAN, SR. , as Debtor-in-possession,

Plaintiff - Appellant,

versus

ARTHUR O. WELLMAN, JR.; EDWARD R. SACKS; and
WELLMAN, INCORPORATED, Successor to Sacks Textile Associates, Incorporated,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston.
G. Ross Anderson, Jr., District Judge.
(CA-86-9-2-8)

Argued; October 2, 1990
Decided: May 13, 1991

Before SPROUSE and WILKINSON, Circuit Judges, and NICKERSON, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Sprouse wrote the opinion, in which Judge Wilkinson and Judge Nickerson joined.

ARGUED: Robert Wayne Byrd, Ronald Eugene Boston, TURNER, PADGET, GRAHAM & LANEY, P.A., Florence, South Carolina, for Appellant. James C. Parham, Jr., WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellee Arthur Wellman; Morris Milton Schnitzer, Roseland, New Jersey, for Appellee Sacks.

ON BRIEF: Michael S. Church, TURNER, PADGET, GRAHAM & LANEY, P.A., Florence, South Carolina, for Appellant. Marshall Winn, WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellee Arthur Wellman; John P. Linton, Marvin D. Infinger, SINKLER & BOYD, P.A., Charleston, South Carolina, for Appellee Sacks; Morris D. Rosen, Alice F. Paylor, ROSEN, ROSEN & HAGOOD, Charleston, South Carolina, for Appellees Wellman, Inc. and Sacks Textile Associates.

SPROUSE, Circuit Judge:

John Wellman, in his action below, sued Arthur O. Wellman, Edward R. Sacks, and Wellman, Inc., successor to Sacks Industries, Inc. (previously named Sacks Textiles Associates, Inc.) , for damages and to set aside a conveyance of stock to Edward Sacks made prior to John Wellman's bankruptcy, under the provisions of §§ 548 and 550 of United States Bankruptcy Code, 11 U.S.C. §§ 548, 550. The district court granted summary judgment to the defendants and John Wellman appeals. We affirm.

I.

In 1983, Wellman, Inc. was a Massachusetts corporation which manufactured and sold recycled synthetic fibers, with its principal manufacturing facility in Johnsonville, South Carolina.

It was owned by two brothers, John and Arthur Wellman, and their immediate families. The plaintiff, John Wellman, was Chairman of the Board of Directors and Chief Executive officer of the company. His brother, Arthur Wellman, was President of the company. The only other member of the Board of Directors was company Treasurer Maximilian Alter. The details of Wellman, Inc.'s capitalization do not bear heavily on the resolution of this appeal. Suffice it to recognize that the two brothers each owned or controlled fifty percent of the voting stock and they or their families owned approximately equal shares of the nonvoting stock.[1]

---

[1]Arthur held 22,440 shares of Common A voting stock, with another 1,250 held in trust for his family. John held 21,838 such shares, with another 1,852 held in trust for his family.

While Arthur held 197,443 and John 201,065 shares of Common B non-voting stock, their families held in trust 11,250

The voting stock had been placed in a voting trust with the two brothers as sole trustees. All actions concerning the stock required a unanimous vote of the trustees, with disputes to be resolved by arbitration. Under the Articles of Organization of Wellman, Inc., the shares of stock could not be sold without having first been offered to the corporation. The corporation was apparently successful.

In 1982, the Wellman brothers attempted to sell Wellman, Inc. to Allied Corporation, a company engaged in similar business. The sale, however, failed to materialize. In 1983, John Wellman

---

and 16,668 shares, respectively.

Finally, Arthur held 21,567 shares of second preferred stock, with another 21,170 held in trust or owned by his family. John held 14,116 shares of second preferred stock, with another 26,160 owned or held in trust by his family.

advised his brother, Arthur, that he still wished to sell his stock, and the latter contacted Edward Sacks, President and principal owner of Sacks Textiles Associates, Inc., concerning a possible purchase of his brother's stock. Sacks eventually purchased John's interest, and he and Arthur Wellman continued to operate Wellman, Inc. for about two years before selling it in a leveraged buyout, which realized a profit far greater than that paid to John Wellman for his stock.

Not directly related to the Wellman brothers' operation of their synthetic fibers business was John Wellman's involvement in another venture--the Lakewood Plantation Company, Inc., a pork processing enterprise. In 1981, John Well-man and one of his sons founded the corporation which suffered a disastrous financial end. John invested

several million dollars in Lakewood. Relying on the anticipated 1981 sale of Wellman, Inc. to Allied, he guaranteed $6,000,000 in loans made to Lakewood. He eventually sold his shares to his accountant for $1,466 (apparently in order to realize the loss for tax purposes) . In 1984 John Wellman filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101, et seq. His schedules revealed assets of $13,353,845.34 and liabilities of $8,420,161.96, for a net worth of $4,933,683.38. His bankruptcy plan evinced an intention that all creditors be paid and eventually they were. In the spring of 1986, after the action sub judice was filed, John Wellman paid all allowed administrative expenses and all unsecured creditors 100 percent of their claims, with interest. The three secured

creditors (The Citizens & Southern National Bank, Budd Leasing Corporation, and Travelers Insurance Company), with claims in the aggregate amount of $8,234,284, received the collateral Wellman had assigned to secure the loans and payment of $5,187,024.50 in cash (including interest in the approximate amount of $864,639, and attorneys' fees of $200,000).

John Wellman also gave these three creditors non-recourse notes in the total amount of $600,000, which, according to their terms, were to be paid only out of a net recovery or settlement of the lawsuit we now review and another.[2] The

---

[2]John Wellman had previously filed suit to set aside the sale of his shares in Wellman International Ltd., an Irish corporation partially owned by Wellman, Inc. In October 1988, he consented to a voluntary nonsuit, with prejudice.

notes provided that John Wellman, individually, had an "absolute right to direct and control" the lawsuit. This included the right to pursue or abandon it as he chose. As the district court characterized it,

> If there is no net recovery, or if he chooses to abandon the lawsuits (as he has already done with one of them) he owes his creditors nothing more. Only if he chooses to pursue the lawsuit(s) and obtains a net recovery, or if he receives a settlement offer acceptable to his creditors which he rejects, does he owe these creditors anything.

In January 1986, John Wellman, as debtor-in-possession of his bankruptcy estate, brought this action. His amended complaint asserted four causes of action. Wellman's first cause of action sought to set aside his prebankruptcy sale of his stock under § 548 of the Bankruptcy Code, 11 U.S.C. § 548. The other causes of action alleged a breach of fiduciary duty,

common law conspiracy, and violation of securities laws--a claim later abandoned. The district court held, in granting the defendant's motion for summary judgment as to all three remaining causes of action, that John Wellman lacked standing to pursue an action under § 548 because it was pursued in his own behalf rather than for the benefit of the estate, that no fiduciary duty existed between the two wellman brothers, and that there was no evidence of conspiracy. On appeal, John Wellman contends that the district court erred in each of its principal rulings.

II.

The district court ruled that John Wellman had no standing to maintain the § 548 action because it was not for the benefit of his bankruptcy estate. Section 548 of the Bankruptcy Code provides, in pertinent part:

Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

. . .

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or ,obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548.

Section 550 of the Bankruptcy Code provides, in pertinent part:

> Liability of transferee of avoided transfer
>
> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553 (b) , or 724 (a) of this title, the trustee may recover, for the benefit of the estate,
>
> the property transferred, or, if the court so orders, the value of such property . . . .

11 U.S.C. § 550(a).

Wellman contends that he received less than a reasonably equivalent value from Sacks in exchange for his stock, and that he comes within the requirements of § 548(a)(2)(B)(i), (ii), and (iii). He urges, therefore, that he is entitled to regain his stock or its equivalent value. Successful prosecution of the suit, according to his view, will

result in payment of $600,000 plus interest to the three former secured creditors who hold his conditional notes, and his retention of the balance of the recovery. The defendants, of course, agree with the district court that Wellman lacks standing because a recovery would not benefit the bankruptcy estate--a necessary predicate to a § 548 action to avoid and recover transferred property.

We, likewise, agree with the district court that §§ 548 and 550 provide for avoidances of transfers and allow recovery of the transferred property or its value only if the recovery is for the benefit of the estate. In Granfinanciera, S.A. v. Nordberg, __ U.S. __, 109 S. Ct. 2782 (1989), the United States Supreme Court, although considering the different issue of a Seventh Amendment right to a jury trial, noted that §§ 548 and 550,

rather than creating new causes of action, represented a continuum of the common law principles supporting actions to set aside fraudulent conveyances. Justice Brennan, writing for the majority, stated:

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees--suits which, we said in Schoenthal v. Irving Trust Co. 287 U.S., at 94-95, 58 S.Ct. at 51 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"--are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.
>
> . . .
>
> . . . Congress simply reclassified a preexisting common-law cause of action that was not integrally related to the reformation of debtor-creditor relations . . . .

Id. at 2798-2800.

We have not faced this § 548/550 standing issue before, nor has it received

great attention from other appellate courts. Courts considering the issue, however, have, with unanimity, concluded that a trustee or a debtor-in-possession of a bankruptcy estate cannot maintain an avoidance action under § 548 unless the estate would be benefitted by the recovery of the transferred property. in Whiteford Plastics co. v. Chase Nat'l Bank, 179 F.2d 582 (2d Cir. 1950), the second Circuit Court of Appeals refused to recognize the power of the Chapter 11 debtor to void a defective recorded lien under § 70(c) of the former Bankruptcy Act, 11 U.S.C. § 110(c), because voiding the lien would benefit only the debtor, not the unsecured creditors who had previously accepted the arrangement and could receive no more than the ten percent of their claims which had been provided. To this same general effect is In re Vintero Corp., 735 F.2d

740, 742 (2d Cir. 1984); in re Schwab, 613 F. 2d 1279, 1281 n. 2 (5th Cir. 1980) ; and City Nat'l Bank & Trust Co. v. Oli..r, 230 F.2d 686, 690 (10th Cir. 1956).

In our view, this conclusion in this case is mandated by the language of § 550(a) that "the trustee may recover, for the benefit of the estate, the property transferred." (Emphasis added.) In support of this principle, Collier on Bankruptcy states:

> The preamble to section 550(a) limits the trustee by permitting recovery only for the benefit of the estate. Thus, in general, the trustee or debtor in possession may not recover the property transferred or its value when the result is to benefit only the debtor rather than the estate.

4 Collier on Bankruptcy, ¶ 550.02 n.3 (15th ed. 1979).

John Wellman, nevertheless, insists that the estate would be benefitted if he were to succeed in

regaining his stock or its value. Our final task in this context then is the review of the district court's determination that Wellman's § 548 action was not for the benefit of the estate. We agree with the bankruptcy courts that have generally recognized that the answer to that question depends on a case-by-case, fact-specific analysis. See In re Tennessee Wheel & Rubber Co., 64 Bankr. 721, 725 (Bankr. M.D. Tenn. 1986) (noting that the "'benefit' to unsecured claimholders necessary to support a debtor's post-confirmation recovery powers has taken many forms in the reported decisions") , aff'd, 75 Bankr. 1 (1987) ; In re Southern Indus. Banking Corp. , 59 Bankr. 638 (Bankr. E.D. Tenn. 1986) ; In re Join-In Int'l (USA) Ltd., 56 Bankr. 555 (Bankr. S.D.N.Y. 1986), City Nat'l Bank & Trust Co. v. oliver, 230 F.2d 686, 690

(10th Cir. 1956). That analysis persuades us to the view expressed by the district court.

John Wellman's indebtedness to Budd Leasing was $1,233,571.6 To Citizens & Southern National Bank it was $5,136,115.40. Wellman made a cash payment to Budd Leasing in the amount of $715,507.18 and was given credit for paid interest in the amount of $115,521.45 for a total of $831,028.63. Citizens & Southern National Bank was paid $4,000,392.40 as a cash payment and allowed credit for interest paid in the sum of $452,905.00 for a total of $4,453,297.40. Travelers received a comparable settlement of its claim, including, like the others, the retention of collateral. The amended plan included nonrecourse notes to Citizens & Southern in the amount of $425,450, to Budd Leasing

for $74,550, and to Travelers for $100,000.[3] Evidence, however, that these creditors would have accepted the plan without the nonrecourse notes are the conditions contained in the notes which precluded recovery on them in the event Wellman failed to prosecute the action or was unsuccessful in prosecuting it. More significant perhaps was the surplus remaining in the estate after payment of all creditors. John Wellman, with the court's approval, distributed to himself surplus cash and property valued at $2,524,769, several times the sum necessary to meet the short fall purportedly represented by the conditional notes.

The district court found that

---

[3] The three non-recourse notes, if paid, would result in 100 percent payment of these claims.

John Wellman executed the non-recourse promissory notes to the creditors in an attempt to create a claim in the estate so that he could obtain a "massive surplus recovery" for himself in addition to the surplus distributed to him. The court emphasized that the action of Wellman as debtor-in-possession could be maintained or dropped at his absolute discretion; the suit was not required by the secured creditors; and that under the settlement agreement, the secured creditors received cash and collateral sufficient to satisfy them. We agree.

We are likewise convinced that there is no merit to John Wellman's contention that his brother breached a fiduciary duty to him, and that the defendants were liable to him under a conspiracy theory. We affirm that portion of the summary judgment based on the

district court's opinion.

The judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No.
2:86-0009-8

JOHN G. WELLMAN, SR., as Debtor-in-Possession, Plaintiff,	
v.	ORDER
ARTHUR O. WELLMAN, JR., EDWARD R. SACKS, and WELLMAN, INC., Successor to Sacks Textile Associates, Inc., Defendants.	

The defendants' motion for summary judgment was heard by the Court on September 29, 1989. For the reasons stated below the motion is granted as to all causes of action.

This action was brought by the plaintiff John G. Wellman, Sr. ("Jack

Wellman"), as debtor-in-possession, in an attempt to set aside his prebankruptcy sale of, or to recover the value of, his stack in a family corporation, Wellman, Inc. Four causes of action were asserted in the second amended complaint; one of these (the third cause of action) alleging violation of state and federal securities laws was abandoned prior to the hearing.[1] Of the causes of action remaining, the first seeks to set aside Jack Wellman's sale of his stock under § 548 <u>et seq</u>. of the Bankruptcy Code, 11 U.S.C. § 548, the second alleges a breach of fiduciary duty, and the third (stated as the fourth cause

---

[1] The plaintiff had earlier abandoned a cause of action for interference with contractual rights with reference to a proposed sale of Wellman, Inc. to Allied Corporation and a cause of action under the South Carolina Unfair Trade Practices Act.

of action) alleges common law conspiracy.[2]

The sale of stock which plaintiff seeks to set aside took place on October 5, 1983. He now claims that his bankruptcy proceeding entitles him to avoid the sale.

BACKGROUND

In 1983, Wellman, Inc. was a Massachusetts corporation, headquartered in Boston, engaged in the manufacture and sale of recycled synthetic fibers. its principal manufacturing facility was

---

[2] This is the second of two cases commenced by the plaintiff as debtor-in-possession. In the first case, John G. Wellman, Sr., as Debtor-in-Possession, v. Wellman, Inc., No. 2:86-0008-8, plaintiff sought to set aside the sale of his shares in Wellman International Ltd., an Irish corporation partially owned by Wellman, Inc. The plaintiff consented to a voluntary nonsuit, with prejudice, in October of 1988 after a summary judgment motion was filed by the Defendant.

located in Johnsonville, South Carolina.

The plaintiff, Jack Wellman, was the Chairman of the Board of Directors and Chief Executive officer of the company. His brother, Arthur O. Wellman, Jr. ("Bud Wellman"), was the President of the company. Both men served on the Board of Directors, whose only other member was Maximilian Alter, the Treasurer of the company. Jack Wellman, by his own account, ran the company and knew more about the company than anyone else.

At the time of the sale plaintiff's stock to Sacks Textile Associates, Inc. ("Sacks Textile") an October 5, 1983, Wellman, Inc. was capitalized into four series of stock:
Common A, Common B, First Preferred and Second Preferred. All of the stock was owned in one form or another by the two brothers and their family members, with

the exception of the First Preferred stock, which was held by the company pension plan.

Only the common A stock had voting rights. All of the Common A stock either was owned outright by Jack Wellman or Bud Wellman or was controlled by them as trustees for their respective family members. Each brother owned or controlled precisely 50 percent of the voting stock of the Company.

The Common A stock owned individually by the two brothers (amounting to some 93.4 percent of the total outstanding Common A stock) was deposited in and subject to a voting trust, dated September 3, 1981, of which Jack Wellman and Bud Wellman were the only trustees. Under the voting trust, all actions concerning the stock required a unanimous vote of the trustees, with disputes to be resolved by

arbitration. The voting trust, by its terms, was to remain in effect until 1991, and the stock could not be conveyed before then unless the trustees or the shareholders agreed to an earlier termination or, in the event of a dispute, an arbitration ordered the trust terminated.

The shares of Common B and Second Preferred stock were held either individually by the two brothers, in trust for family members, or individually by family members. Jack Wellman and his family held slightly more shares of Common B stock than did Bud Wellman and his family, but held slightly fewer shares of Second Preferred stock.

Under the Articles of Organization of Wellman, Inc., the shares of stock in these four series could not be sold without first offering them to the corporation. The corporation had the

right to purchase the shares pursuant to a formula set out in the Articles. The corporation could, by vote of its Board of Directors, waive these restrictions on transfer.

Commencing in early 1982, Jack and Bud wellman engaged in negotiations to sell the entire company to Allied Corporation. On March 15, 1983, they signed a letter of intent whereby the parties were to consider such a purchase. The letter of intent

was not binding.

in early July of 1983, Allied notified Jack Wellman that it was terminating the negotiations. The plaintiff thereafter attempted, unsuccessfully, to revive Allied's interest in the acquisition. On July 27, 1983, Wellman, Inc. issued press releases and notices to its employees that the

negotiations with Allied had terminated.

On August 15, 1983, the plaintiff advised his brother, Bud Wellman, that he wished to sell his stock in Wellman, Inc. and asked him to suggest prospective purchasers.[3] Bud Wellman suggested Edward Sacks and, at the plaintiff's request, contacted Mr. Sacks, who expressed interest in exploring the matter.

Sacks Textile had long been both a major supplier of raw material to wellman, Inc. and a major customer for recycled fiber. Negotiations then commenced between Jack Wellman and Edward Sacks, in which Jack Wellman was represented by

---

[3] The plaintiff entered into a stock purchase agreement the same day with Wellman, Inc., to sell all of his shares of Wellman International Ltd. to Wellman, Inc. This transaction was the subject of the other lawsuit by the plaintiff, as debtor-in-possession, which was abandoned.

counsel from the McNair Law Firm. At a meeting in Boston on September 8, 1983, Jack Wellman (accompanied by counsel) and Edward Sacks reached an oral preliminary agreement in principle, for the plaintiff and his family members to sell their shares in the company to Sacks Textile for \$2.5 million in cash, a note for \$6.5 million (secured by the shares and guaranteed personally by Edward Sacks), and a release of the plaintiff's personal guarantees for the bank debt of Wellman, Inc., in the approximate amount of \$54 million (most of which was in the form of demand notes). The guarantees were to be assumed by Edward Sacks, personally, as part of the transaction. This oral agreement was conditioned upon due diligence explorations and the execution of a formal agreement by the parties concurrently with the closing

approximately one month later.

The plaintiff and his family members sold their shares to Sacks Textile in a formal closing in Boston on October 5, 1983.[4] As part of the closing, the plaintiff and his brother, as trustees of the voting trust, executed the necessary documents to terminate the voting trust, and the Board of Directors (including the plaintiff and his brother) executed the necessary documents to waive the restrictions on transfer of the stock contained in the Articles of Organization. The plaintiff warranted to Sacks Textile that he was conveying good title to the stock.

---

[4] Jack Wellman himself owned 89.9% of the stock sold to Sacks Textile. His claim to avoid the sale is solely concerned with the shares sold by him, and does not include any of the shares sold by other members of his family.

At the same closing, an agreement labeled "Stockholders' Agreement" was entered into between Sacks Textile, Bud Wellman, Edward Sacks, and Wellman, Inc., whereby a small number of shares in the Common B and the Second Preferred series were exchanged between them to give each exactly 50 percent ownership or control in those two series o.f non-voting stock. (The voting stock was already 50-50 prior to the plaintiff's sale.) Pursuant to this agreement, Bud Wellman received 4,520 shares (or roughly 1 percent) of the Common B stock from Sacks Textile, and conveyed 1,230.5 shares (or roughly 1.5 percent) of the Second Preferred stock to Sacks Textile. In other respects the Stockholders' Agreement regulated the parties in the operation of Wellman, Inc., by Sacks Textile and Bud Wellman as equal half owners. The Agreement provided <u>inter</u>

alia that once Sacks Textile had paid its note to Jack Wellman, on March 31, 1991 at the latest, Sacks Textile would discontinue its textile business and related activities, which then would be carried on by Wellman, Inc., but Sacks Textile could continue its fiber bonding business. At the same time, Wellman, Inc. would receive any increase in the net worth of Sacks Textile accumulated after July 31, 1983, excluding the Sacks Textile holdings in Wellman, Inc. and the fiber bonding business. The plaintiff and his counsel were given drafts of the Stockholders' Agreement prior to the closing for review and comment, and at the closing itself the plaintiff, as a director of Wellman, Inc. and as a voting trustee, consented to the Stockholders' Agreement and joined in the termination of

the Voting Trust.[5]

After the sale, Bud Wellman and Edward Sacks were the principal officers of the corporation. They continued to operate the company until August 1985, at which point they sold the entire company in a leveraged buyout. It was not until Jack Wellman learned of this sale in 1985 that he began to complain about the consideration which he received for his stock in 1983. In the course of the leveraged buyout, Edward Sacks also sold Sacks Textile and received separate compensation for it. The investors in the leveraged buyout merged the existing Wellman, Inc. (a Massachusetts corporation) and Sacks Textile and created

---

[5] The plaintiff abandoned an earlier attempt to make the alleged failure to disclose the Stockholders' Agreement a part of his securities law claim.

a new Wellman, Inc., a Delaware corporation. It is this corporation which, as successor to Sacks Textile, is a defendant
in this action.

As part of the leveraged buyout, the $6.5 million note made by Sacks Textile was prepaid in full in August 1985. Jack wellman, by then debtor-in-possession, received his 89.9% share
of the proceeds.

In 1981, the plaintiff had become engaged in a new and separate business venture, Lakewood Plantation Company, Inc. ("Lakewood Company"), which was intended to process and sell pork products. Bud Wellman advised his brother against becoming involved in this new business, with which he had no experience, but the plaintiff ignored this advice.

The plaintiff owned 90 percent of the

stock of Lakewood Company, the remainder of the stock being owned by the plaintiff's son Michael Wellman. In addition, the plaintiff personally guaranteed certain loans made to Lakewood Company. At the time of the sale of his Wellman, Inc. stock in 1983, the amount of these personal guarantees was slightly over $6,000,000.

After the plaintiff and his brother executed the letter of intent to sell the company to Allied on March 15, 1983, the plaintiff borrowed additional money to fund Lakewood Company, an the expectation that Allied would soon purchase wellman, Inc.

When Jack Wellman sold his stock to Sacks Textile on October 5, 1983, he received his 89.9% share of the $2.5 million in cash and the $6.5 million note, and approximately $2 million from his

pension plans at Wellman, Inc. and Wellman Industries. Thus altogether he received approximately $4,250,000 in cash and 89.9% of the $6.5 million note from the sale of his Wellman, Inc. shares, as well as relief from his personal guaranties of the Wellman, Inc. bank debt.

Prior to the sale on October 5, 1983, the only business with which the plaintiff was involved which required additional funding was Lakewood Company. The plaintiff testified in depositions that as of October 5, 1983, with the sale of his stock, he had no plans to incur additional debt and was locking toward a bright future without bankruptcy.

On December 30, 1983, the plaintiff sold all his shares in Lakewood Company to his accountant for $1,466. He then declared a loss on his 1983 taxes for the difference between that and the cost basis

of his Lakewood stock -- $5,849,406 -- thus offsetting a large portion of the capital gain on the sale of his Wellman, Inc. stock.

On August 1, 1984, plaintiff filed a petition under Chapter 11 of the Bankruptcy Code. In re John G. Wellman, No. 84-01142 (Bankr. D.S.C.). In schedules filed on August 16, 1984, fifteen days after filing the petition in bankruptcy, Jack Wellman listed assets of $13,353,845.34 and liabilities of $8,420,161.96, for a net worth of $4,933,683.38. There was no claim listed on those schedules, and none was ever subsequently added, concerning the claims he makes in this case.[6]

---

[6] The plaintiff did list a claim for the sale of his stock in Wellman International Ltd., which formed the basis of the other lawsuit which he abandoned.

At the same time the plaintiff filed his bankruptcy petition, Lakewood Company also filed a petition under Chapter 11. In re Lakewood Plantation Company, Inc., Case No. 84-01143 (D.S.C.).

At no time before, during or after his bankruptcy has the plaintiff reported in financial statements that he was insolvent. All of his personal financial statements show that his assets have exceeded his liabilities by millions of dollars, even when contingent liabilities on his personal guarantees are considered. Financial statements signed and distributed by the plaintiff to his creditors before the bankruptcy, his bankruptcy petition and schedules, and reports filed by the plaintiff with the Bankruptcy Court during his bankruptcy, show the following net worth for the plaintiff on the dates indicated:

[Schedule in footnote][1]

The amounts in the net worth column with an asterisk are alternative calculations based on the conservative assumption that certain contingent liabilities for Lakewood Company debt were immediately due

---

[1]

	Assets	Liabilities	Net Worth
12/31/82	$25,622,137.15	$3,816,135.16	$21,806,001.99
12/31/83	$11,802,156.51	$3,539,436.19	$8,262,720.32
05/24/84	$11,431,551.14	$3,662,231.73	$7,769,319.44
06/30/84	$11,390,676.96	$3,659,950.72	$7,730,726.24
08/01/84	$13,353,845.34	$8,420,161.97	$4,933,683.37
05/31/85	$13,127,806.00	$4,711,270.00	$8,416,536.00 5,847,046.00*
07/31/85	$12,600,623.00	$4,691,770.00	$7,908,853.00 5,339,363.00*
11/30/85	$12,809,679.00	$4,691,770.00	$8,117,909.00 5,548,419.00*
12/31/85	$12,731,903.00	$4,691,770.00	$8,040,133.00 5,470,643.00*
01/31/86	$12,735,504.00	$4,691,770.00	$8,043,734.00 5,474,244.00*

and payable.

In the disclosure statement filed by the plaintiff in the bankruptcy court on December 18, 1985, the plaintiff noted that his assets significantly exceeded his liabilities and stated as follows:

> Thus, it has always been contemplated that the plan would provide for the orderly liquidation of sufficient assets to provide for payment of 100% of the allowed claims under the terms of tile plan, with the remaining assets being returned to the Debtor.

In the spring of 1986, after this action was filed, the plaintiff paid all allowed administration expenses and all unsecured creditors 100% of their claims, with interest. The three secured creditors (The Citizens & Southern National Bank, Budd Leasing Corporation, and Travelers Insurance Company), with claims in the aggregate amount of

$8,234,284, received payment of (a) $5,187,024.50 in cash outright (which included interest in the approximate amount of $864,639 and attorneys, fees of $200,000) and, in addition, (b) a transfer to these creditors of their collateral.[7]

The plaintiff, individually, also gave these three creditors "non-recourse notes," in the total amount of $600,000, which according to their terms are to be paid only out of a net recovery or settlement in either of the cases filed by the plaintiff. Jack Wellman, individually, has an "absolute right to direct and control" these lawsuits, including the right to pursue or abandon them as he chooses. If there is no net recovery, or if he chooses to abandon the

---

[7] This collateral was valued in 1983 and 1984 at $7,031,974, by the plaintiff's appraisers.

lawsuits (as he has already done with one of them) he owes his creditors nothing more. only if he chooses to pursue the lawsuit(s) and obtains a net recovery, or if he receives a settlement offer acceptable to his creditors which he rejects, does he owe these creditors anything.

Both before and after the time these notes were executed, the plaintiff's personal financial statements showed sufficient assets to pay these three creditors in full. The plaintiff received assets reported at approximately $2,500,000 as surplus money and property of his bankruptcy estate after the final distribution to his creditors and payment of administration expenses. The Bankruptcy Court-approved plan of reorganization does not require the plaintiff to pursue either lawsuit. His

Chapter 11 case remains open solely for the purpose of permitting the plaintiff to pursue this lawsuit, if he so chooses, and at his own expense.

Jack Wellman's family members, who owned some 10.1% of the stock that was sold to Sacks Textiles on October 5, 1983, have made no attempt to reverse their sales.

BANKRUPTCY CODE SECTIONS 548 AND 550

The plaintiff lacks interest or standing to pursue this

claim under §§ 548 and 550 of the Bankruptcy Code, as a debtor-

in-possession, because in the last analysis the claim is pursued

for his personal benefit and not for the benefit of his creditors. This action also constitutes a misuse, and abuse, of the bankruptcy laws for the plaintiff's

personal gain.

The plaintiff contends that this action is pursued for the benefit of his creditors to obtain a recovery from which to pay the notes in the amount of $600,000. The defendants say that the plaintiff's bankruptcy estate had more than enough assets to pay these notes, and that, instead of paying the notes, the plaintiff paid himself, as surplus assets, money and property he reported at approximately $2,500,000. The plan of reorganization under which he claims to proceed does not require pursuit of this action, or even payment of the notes, unless there is a net recovery or settlement offer which the noteholders accept and the plaintiff rejects. The defendants maintain that the notes are merely a device to grant him debtor-in-possession status under § 548 so

that he can attempt to avoid the prepetition sale of his stock in the guise of an action for the benefit of creditors.

The applicable statutory and case law establishes beyond doubt that the remedy of avoidance is to be used only when necessary for the benefit of creditors, and is never to be employed by a debtor-in-possession to gain a windfall for his personal benefit.

Section 550 provides that if the criteria for avoidance under § 548 are satisfied, the debtor-in-possession is then entitled to "recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . . ." (Emphasis added). If the avoidance action is not brought for the benefit of the creditors it cannot be maintained. This is fundamental in the language of the Code and in the case law.

Sections 548 and 550, the fraudulent transfer provisions of the Bankruptcy Code, are derived from § 67d of the Bankrupcty Act, which was based upon the Statute of Elizabeth, 13 Eliz. ch. 5 (1570). _See_ _Weiboldt Stores, Inc. v. Schottenstein_, 94 B.R. 488, 499 (Bankr. N.D. Ill. 1988). The substance of the Statute of Elizabeth was carried forward and into the Uniform Fraudulent Conveyance Law, and later, in 1984, into the Uniform Fraudulent Transfer Act (whose language largely conforms to that of § 548). _See_ 4 _Collier on Bankruptcy_ § 548.01(1) (15th ed. 1988); Report of Judiciary Committee, No. 95-989, 95th Cong., 2nd Sess. 89 (1978). The remedies of the Bankruptcy Code, like those of the Bankruptcy Act and the source statutes, are solely for the benefit of creditors. (The South Carolina fraudulent

conveyance law is a codification of the language of the Statute of Elizabeth, S.C. Code § 27-23-10, and is available solely to creditors. Mitchell v. Cleveland, 76 S.C. 432, 57 S.E. 33 (1907)). The Bankruptcy Code, including §§ 548 and 550, followed the same theme, continuing the remedy known to the common law. See Granfinanciera, S.A. v. Nordberg, 492 U.S. __, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). In Collier, both aspects of the § 550(a) restriction point to the conclusion that a recovery must inure to the "estate," i.e., the creditors, and, conversely, a recovery for only the debtor-transferor is prohibited:

> The preamble to § 550(a) limits the trustee by permitting recovery only for the benefit of the estate. Thus, in general, the trustee or debtor in possession may not recover the property transferred or its value when the result is to benefit only the debtor rather

than the estate.

4 Collier on Bankruptcy, § 550.02 at 550-5 n. 3 (15th ed. 1988).[8]

The case law reflects the origin and purpose of 5 548 and § 550 and their predecessors. In Whiteford Plastics Co., Inc. v. Chase National Bank, 179 F.2d 582 (2d Cir. 1950) the Bankruptcy Court dismissed the debtor's petition to avoid a lien. Judge Augustus N. Hand, writing for the majority, observed:

The debtor never contributed or

---

[8] The only instance in which the debtor can bring an action to avoid a transfer of property for its own benefit is under Bankruptcy Code Section 522(h), which provides that the "debtor may avoid a transfer of property ... to the extent that the debtor could have exempted such property under [Bankruptcy Code) subsection [522)(g)(1)". However, even then the debtor can only bring. the action if ,such transfer was not a voluntary transfer of such property by the debtor". 11 U.S.C. § 522(g)(1)(A). See In re Enserv Co., 64 S.R. 519 (Bankr. 9th Cir. 1986).

> offered to contribute this value (of the transfer sought to be avoided) to the plan and now seeks to obtain it purely for its own benefit. This we think it cannot do. In our opinion the bank, which had a good secured claim as against the debtor, can still hold it where the petition to avoid the rule is not in the interest of the general creditors.

179 F.2d at 584. The same principle was reaffirmed by the dissent:

> . . . . The bankruptcy court has ample powers to see that the avoidance of security shall not result in a windfall to the debtor, but shall inure to the benefit of the general creditor, for whom it was intended.

Id. at 585 (Clark, J., dissenting).

In In re Vintero Corp., 735 F.2d 740 (2d Cir- 1984), cert. denied, 469 U.S. 1087 (1984), the Second Circuit emphasized, again, that avoidance powers are to be exercised only for the benefit of the creditors:

> Vintero [debtor-in-possession] was given the right to avoid

> CVF's security interest in order to protect [creditors], not to create a windfall for Vintero itself . . . . such disposition will protect the interests of Vintero's creditors . . . . and will preclude the possibility of Vintero reaping an undeserved windfall.

735 F.2d at 742, 743. Vintero also stressed the court's duty to apply equity and do substantial justice, citing Pepper v. Litton, 308 U.S. 295 (1939). See also In re Schwab, 613 F.2d 1279, 1281 n.2 (5th Cir. 1980) and City National Bank & Trust Co. v. Oliver, 230 F.2d 686, 690 (10th Cir. 1956).

Although the issue has not yet been dealt with by the Court of Appeals for the Fourth Circuit, or the District Courts in the District of South Carolina, no Court of Appeals anywhere has departed from the Whiteford holding, and District Courts have also followed this lead. In In re Oceana International, Inc., 376 F. Supp.

956 (S.D.N.Y., 1974), the debtor sued to avoid a sale after confirmation of a plan which paid creditors 10% from sources independent of the litigation. While the issue was jurisdiction, the ruling was based upon the absence of any interest of the general creditors in the outcome:

> In sum, this proceeding is for the sole benefit of the debtor; it cannot contribute to the effectuation of the arrangement, and consequently jurisdiction over it was lost when the arrangement was confirmed.

376 F.Supp. at 962. See also Tennessee Wheel & Rubber Co. v. American Express Travel Related Services Co., 64 B.R. 721 (Bankr. M.D. Tenn. 1986), aff'd, 75 B.R. 1 (M.D. Tenn. 1987), a case heavily relied upon by the plaintiff, where the primary issue was availability of the avoidance powers to a post-confirmation debtor-in-possession. The Bankruptcy Court answered this question in the

affirmative, finding that "the benefit to [the] creditors is great," and that recoveries in that case under the avoidance provisions were "essential to the debtor's ability to pay its creditors pursuant to the confirmed plan." 64 B.R. at 726. Contrary to the plaintiff's view, Tennessee Wheel provides no authority for windfall recoveries by a debtor-in-possession such as the recovery he seeks in this case. See also In re Join-In Int'l (U.S.A.) Ltd., 56 B.R. 555 (Bankr- S.D.N.Y. 1986).

The courts have permitted the debtor-in-possession to seek an avoidance under the Bankruptcy laws only where the debtor had a continuing obligation under the plan of reorganization or payment plan and thus the debtor's post-confirmation financial condition was relevant to what the prepetition creditors received. In

Tennessee Wheel & Rubber, post-confirmation use of avoidance powers was approved because it "dramatically enhanced" the chances of the creditors' being paid. In fact, the payment to unsecured creditors came from the proceeds of a loan by the major secured creditor, the only source of post-petition financing, without which there would have been nothing to distribute. The only means of financing this loan was through recoveries in the avoidance actions and future operations. The necessity of these actions for the benefit of the creditors, therefore, was obvious. Since that case arose on motions to dismiss the avoidance complaints, it could not be known whether any net recoveries would exceed what was needed to pay creditors and that issue was never confronted. See also In re Centennial Industries Inc., 12 B.R. 99

(Bankr. S.D.N.Y. 1981); In re Southern Industrial Banking Corp., 59 B.R. 638 (Bankr. E.D. Tenn. 1986); In re Jennings, Inc., 46 B.R- 167 (Bankr. E.D. Pa. 1985).

Neither the creditors who hold the notes nor the Bankruptcy Court considered it necessary that the plaintiff be required to pursue the instant action. The plan of reorganization, joined in by these creditors and approved by the Bankruptcy Court, permits, but does not require, the plaintiff to pursue this action, at his own expense. The plan gives Jack Wellman, individually, the absolute right to direct and control the litigation, including the right to abandon it, as he did the companion case, for any reason, or no reason at all, without further obligation to his creditors. The moment the plan was approved the debtor could have abandoned both lawsuits, with

no explanation, completely free of all claims of his creditors. The plan, in effect, was a complete release of the debtor by the creditors, subject only to the creditors' stake (in the form of the notes) in the outcome of the litigation if, and only if, Jack Wellman chose to pursue it. The plaintiff therefore chose to pursue this action not because he was required to, but for other reasons of his own. Whatever those reasons might be, it is clear that the debtor-plaintiff, the creditors, and the Bankruptcy Court all made the considered decision to absolve the plaintiff, absolutely, from any legal obligation to pursue this action. This fact alone casts doubt on the extent to which the creditors could have relied upon the notes in approving the plan. The plaintiff argues that his plan provided for payment of 100% of all allowed claims

"only by providing that the debtor-in-possession pursue a recovery in this avoidance action." The debtor, however, is not required to pursue a recovery in this avoidance action. It appears that the notes are of more importance to the plaintiff than to his creditors.

An avoidance action which is pursued solely at the pleasure of the debtor, subject even to his whim and fancy, is but a short step from an avoidance action pursued solely for the debtor's personal benefit. To make the extraordinary powers of avoidance available to a debtor's whim and fancy, even his deliberate, but unrestricted free choice, is to subvert them to his personal use.

The plaintiff lacks standing, and his action is a misuse of the bankruptcy laws, for another reason. Normally, a creditor

seeking to reverse a conveyance fraudulent as to him is limited to recovering the amount of the debt. Any remaining balance or surplus of the property so transferred belongs to and must remain with the transferee. 37 C.J.S. Fraudulent Conveyances § 458; 37 Am. Jur. 2d Fraudulent Conveyances § 237. Collier also states:

> In the event, however, that a complete distribution and settlement of the estate leaves a surplus, as between the fraudulent transferee and the fraudulent transferor (the bankrupt) the transferee is entitled to any portion thus remaining, to the full amount of his interest, after all claims and costs in the bankruptcy proceeding have been paid.

Collier on Bankruptcy ¶ 67.49 at 698 (14th

ed. 1978) (emphasis added). See also Smith v. Seibel (In re Seibel), 258 F. 454, 44 Am.B.R. 499 (N.D. Iowa 1919), Collier on Bankruptcy ¶ 70.95 at 1106-1107 (14th ed. 1978); Bartle v. Markson, 299 F. Supp. 958 (N.D.N.Y. 1969), aff'd, 423 F.2d 637 (2d Cir. 1970). These cases are consistent with the holding that windfalls to debtors-inpossession in avoidance actions under §§ 548 and 550 of the Bankruptcy Code are prohibited.

The plaintiff's ambitions for personal recovery beyond his creditors' claims stagger the imagination. He offers no explanation for the contrast between the benefit he seeks for his creditors and the massive surplus recovery he seeks for himself, in addition to the surplus money and property already distributed to him from his bankruptcy estate with creditor consent. Even if the notes were a benefit

to creditors contemplated by the Code, there is no basis for such a windfall. The plaintiff relies on the holdings in Tennessee Wheel, supra, and In re Morris Communications NC, Inc., 75 B.R. 619 (Bankr. W.D.N.C. 1987), as authority for such excess recovery. These cases cannot be so used. Both decisions track the fundamental view that avoidance powers exist for the benefit of creditors, and neither decision sanctions recoveries in excess of creditors' claims.

Tennessee Wheel holds that "case-by-case analysis is appropriate to determine if the nature and extent of the benefit to unsecured claimholders is sufficient to support the exercise of avoidance powers after confirmation." 64 B.R. at 726. An analysis of the plaintiff's claim reveals none of the conditions justifying an avoidance action.

If it were not obvious that plaintiff had assets to pay all claims and if the plan or notes included any reasonable requirement that the plaintiff pursue these actions, or at least that the decision to pursue or abandon them be made in good faith, there might be some plausible basis for an avoidance action limited to the amount of the creditors' claims. Smith v. Seibel (In re Seibel), 258 F. 454, 44 Am.B.R. 499 (N.D. Iowa 1919); Collier on Bankruptcy ¶ 70.95 at 1106-1107 (14th ed. 1978); see Bartle v. Markson, 299 F. Supp. 958 (N.D.N.Y. 1969), aff'd, 423 F.2d 637 (2d Cir. 1970). Here, however, there is no such requirement. A windfall to the debtor, and most certainly one in the magnitude sought by the plaintiff, is supported by no authority and would constitute a mockery of the Bankruptcy laws.

It is well settled that a Chapter 11 case may be dismissed if it appears that the petition was filed in bad faith. In re Stolrow's, Inc., 84 B.R. 157, 170 (9th Cir. BAP 1988); In re Hulse, 66 B.R. 681, 682 (Bankr. M.D. Fla. 1986).

> That borderline [between fulfilling and perverting the Bankruptcy laws] is patrolled by courts of equity, armed with the doctrine of "good faith." . . . [i]n evaluating a debtor's good faith, the court's only inquiry is to determine whether the debtor seeks to abuse the bankruptcy law by employing it for a purpose for which it was not intended.

In re Clinton Centrifuge, Inc., 72 B.R. 900, 904-5 (Bankr. E.D.Pa. 1987) (emphasis added). See also In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988). Although these cases deal with Chapter 11 petitions, their principles apply here. The degree to which the plaintiff has manipulated the avoidance

powers for his personal ventures constitutes a misuse and abuse of the Bankruptcy law "by employing it for a purpose for which it was not intended."

Although it is not necessary as a-basis of the decision to grant summary judgment, the Court further finds that the present action under § 548 has not been pursued by the plaintiff in good faith for the benefit of his creditors.

The defendants presented additional grounds for summary judgment under § 548(a)(2), (i), (ii) and (iii) arguing that the criteria under these sections had not been satisfied by the plaintiff. Even absent a factual determination of plaintiff's net worth at any particular time, plaintiff's documents on their face show a striking inconsistency between his considerable personal wealth, as indicated therein, and his allegations of

insolvency, insufficiency of capital and inability to pay his debt as they matured, in this case. Were it necessary to rule on these issues, the court would conclude that the plaintiff has failed to meet the criteria under any of these sections.

FIDUCIARY DUTY

The plaintiff and his brother, Bud Wellman, were involved with each other as fellow officers, directors, equal holders, with their respective families, of the voting shares of Wellman, Inc, a closely held corporation, trustees under the voting trust of those shares and as siblings. The plaintiff maintains that his brother breached a fiduciary duty arising from one or more of these relationships. These allegations are enumerated in the plaintiff's response to the defendants' motion for summary judgment (pp. 38-40), and are, essentially, as

follows:

(1) Bud Wellman informed Edward Sacks that the plaintiff was in serious financial trouble;

(2) Bud Wellman suggested to Edward Sacks a price for which the plaintiff's shares in wellman, Inc., could be purchased;

(3) Bud Wellman restricted the plaintiff's ability to market the Wellman, Inc., stock freely;

(4) Bud Wellman profited from the Stockholders' Agreement, which resulted from the plaintiff's sale of his Wellman, Inc., shares to Sacks Textile.

Even if these allegations are assumed to be true, there has been no breach of fiduciary duty by the defendant Bud Wellman.

At the time of the sale, Wellman,

Inc., was a corporation organized under the law of Massachusetts. Under Massachusetts law, the fiduciary duty on which the plaintiff relies applies only where stockholders take some action in the operation of a close corporation designed to oppress or disadvantage the rights or investments of other stockholders.

Under Massachusetts law, the stockholders in a close corporation owe one another a fiduciary duty of "utmost good faith and loyalty," first recognized by the Massachusetts Supreme Judicial Court in the case of Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 593, 328 N.E.2d 505, 515 (1975). In describing this fiduciary duty, the court in Donahue noted same of the means by which majority stockholders in a close corporation can oppress or disadvantage minority stockholders:

The minority is vulnerable to a variety of oppressive devices, termed "freeze-outs," which the majority may employ. See, generally, Note, Freezing out Minority Shareholders, 74 Harv. L. Rev. 1630 (1961). An authoritative study of such "freeze-outs" enumerates some of the possibilities: "The squeezers [those who employ the freeze-out techniques] may refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority shareholders . . . ; they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders . . . ." F. H. O'Neal and J. Derwin, Expulsion or Oppression of Business Associates, 42 (1961). In particular, the power of the board of directors, controlled by the majority, to declare or withhold dividends and to deny the minority employment is easily converted to a device to disadvantage minority stockholders.

367 Mass. at 590, 328 N.E.2d at 513. Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 849, 353 N.E.2d 657, 662 (1976) is in accord. The Donahue court took care to set out the limits of this duty:

> We stress that the fiduciary duty which we apply to stockholders in a close corporation in this opinion governs only their actions relative to the operations of the enterprise and the effects of that operation on the rights and investments of other stockholders.

367 Mass. at 593 n.18, 328 N.E.2d at 515 n.18 (Emphasis in original). The court in Donahue expressed "no opinion as to the standard of duty applicable to transactions in the shares of the close corporation when the corporation is not a party to the transaction.

The recent South Carolina case of Shoaf v. Warlick, __ S.C. __, 380 S.E.2d

865 (1989) holds that a majority shareholder owes no fiduciary duty to a minority shareholder to obtain for the minority shareholder the same price received by the majority shareholder in connection with a 100% stock acquisition by a third party.

The Massachusetts cases decided since Donahue are consistent with these general views. See Wilkes v. Springside Nursing Home Inc., 370 Mass. 842, 353 N.E.2d 657 (1976); Zimmer v. Bogoff, 402 Mass. 650, 524 N.E.2d 849 (1988); Bodio v. Ellis, 401 Mass. 1, 513 N.E.2d 684 (1987); Smith v. Atlantic Properties, Inc., 12 Mass. App. 201, 422 N.E.2d 798 (1981); Leader v. Hycor, Inc., 395 Mass. 215, 479 N.E.2d 173 (1985).

Unless action in the operation of the corporation designed to oppress or disadvantage the rights of other

stockholders is involved, the fiduciary duty established in Donahue does not apply. For example, in Goode v. Ryan, 397 Mass. 85, 489 N.E.2d 1001 (1986), the court distinguished its earlier decisions:

> In the instant case, there is no evidence of any oppressive conduct on the part of defendants directed at excluding shares [of the minority] from participation in the affairs of the corporation . . . . The majority shareholders made no effort to curtail, or interfere with, any benefits to which [the plaintiff] was entitled as a minority shareholder . . . .

397 Mass. at 85, 489 N.E.2d at 1004-05. See also Bessette v. Bessette, 385 Mass. 806, 434 N.E.2d 206 (1982), and Evangelista v. Holland, 27 Mass. App. 244, 537 N.E.2d 589 (1989).

This case is unlike any discussed above in which the Donahue duty was applied. The plaintiff was the Chairman

and Chief Executive officer of the corporation. He and his brother owned or controlled equal amounts of voting stock of the corporation, and their exercise of that voting stock was further regulated by a voting trust. Both men were on the Board of Directors. Bud Wellman had no power to force the plaintiff to sell his stock.

The plaintiff seems to have abandoned his contention that the fiduciary duty set down in Donahue has been violated. Instead, the plaintiff relies upon a South Carolina case, Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App, 1987), in which the manager, who was also a 5% shareholder of a corporation passively owned 90% by his former parents-in-law, was sued by the corporation for having conspired to take from the corporation by means of

fraudulent purchase orders. The corporation's affairs, including financial matters, were handled entirely by the defendant. As the officer of the corporation exercising total control over its affairs, he clearly owed a fiduciary duty to the corporation. Island Car Wash is not applicable here, where no fiduciary duty to a corporation is at issue.

The plaintiff contends that only South Carolina law applies to this issue. The defendants argue that Massachusetts law governs, but that under the law of either state summary judgment should be granted. Although the Court is of the view that Massachusetts law governs, there is no fiduciary duty, as alleged by the plaintiff, under the law of either state.

In addition, there is no indication or evidence, even if the plaintiff's allegations are assumed to be true, that

the alleged breaches caused the sale. His present grievances were known prior to the sale, and his decision to go forward was the sole proximate cause of the sale.

The plaintiff also now contends that Bud Wellman breached a fiduciary duty owed as trustee of the 1981 voting trust, of which he and the plaintiff were the sole trustees and sole beneficiaries. The plaintiff maintains that Bud Wellman engaged in selfdealing with respect to the corpus of the voting trust. This trust, which held only the voting stock owned by the two brothers, protected both brothers in this closely held corporation from having an unacceptable co-owner buy into the company. The provisions affected both the plaintiff and Bud Wellman in the same way. There is no basis for the charge that Bud Wellman engaged in self dealing with respect to the trust corpus. All of

the voting stock placed in the trust by Jack Wellman was sold to Sacks Textile; none of it was received by Bud Wellman, directly or indirectly, since he already owned or controlled the remaining 50% of the voting stock. The only thing Bud Wellman did as a voting trustee was to consent with his brother co-trustee (plaintiff), to terminate the trust early. This was Bud Wellman's only act with regard to the plaintiff's stock and it was done at the plaintiff's request. Once the trustees agreed to terminate the trust, Bud Wellman's status as a trustee, and any accompanying fiduciary duty, was ended.[9]

---

[9] The Court also notes the language of the trust instrument which appears to exculpate the trustees from such claims:

> In voting or acting with respect to the deposited stock or any proceeds thereof, the Trustee will exercise their best judgment, but no Trustee assumes any responsibility or shall incur any liability because of any

The Stockholders' Agreement was disclosed to the plaintiff and his counsel before the closing and approved by plaintiff at the closing.

Under the circumstances, the Court can find no basis for the claim that Bud Wellman breached any fiduciary duty.

CONSPIRACY

The plaintiff alleges that the defendants conspired "with the design and purpose to injure the plaintiff in obtaining his stock in Wellman, Inc. for less than the reasonable value thereof." Under South Carolina law, a civil conspiracy is a "combination of two or

---

action taken or omitted by him and the Trustee incurs no responsibility or liability as stockholder, Trustee or otherwise by reason of any error of law or of any matter or thing done or omitted under this Agreement except his own individual malfeasance.

more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff." La Motte v. The Punch Line of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). Similarly, under Massachusetts law, the tort of conspiracy requires proof that two or more persons combined to accomplish an unlawful purpose, or a lawful purpose by unlawful means, and that there was some "peculiar power of coercion of the plaintiff which any individual standing in like relation to the plaintiff would not have had." Cummings v. Harrington, 278 Mass. 527, 530, 180 N.E- 519, 520 (1932); Neustadt v. Employers, Liability Assurance Corp., 303 Mass. 321, 325-26, 21 N.E.2d 538, 540-41 (1939). The plaintiff must prove an overt act done in pursuance of the conspiracy resulting in damage to the plaintiff in addition to damages caused by

any other alleged tort. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981); La Motte, 296 S.C. at 69, 370 S.E.2d at 713.

Under both South Carolina or Massachusetts law, a cause of action for conspiracy requires more than a repetition of other allegations of tortious conduct. The mere allegation that defendants engaged in a conspiracy does not change other causes of action or add to their legal force. Werner v. Lowenstein, 314 Mass. 642, 646, 51 N.E.2d 241, 243 (1943). "[I]nstances of conspiracy which is in itself an independent tort are rare and should be added with caution." Fleming v. Dane, 304 mass. 46, 50, 22 N.E.2d 609, 611 (1939). "'Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or

actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.'" Todd, 276 S.C. at 293, 278 S.E.2d at 611 (quoting 15A C.J.S. Conspiracy § 33). Thus a cause of action which "does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy" fails to state a cause of action. Id. The plaintiff's conspiracy claim does no more than refer to or incorporate by reference allegations in the other counts of the complaint and reallege that the defendants caused the plaintiff injury by obtaining his shares for less than reasonable value which is the same allegation made in the other causes of action. The conspiracy claim is therefore defective, because it is merely

Since the Court has dismissed the plaintiff's cause of action alleging breach of fiduciary duty, the conspiracy claim must fail for the additional reason that the only underlying overt act alleged by plaintiff has been eliminated. In addition, to the extent that the plaintiff points to the overt acts alleged under the § 548 claim to support the claim for conspiracy, he has conceded that the conspiracy claim is duplicative. In either case, summary judgment should be granted under the law of both Massachusetts and South Carolina.

CONCLUSION

For the foregoing reasons, and finding no genuine issue as to any material fact necessary for this decision, the defendants, motion for summary judgment is granted as to all causes of action.

And it is so ordered.

/S/ G. Ross Anderson, Jr.
United States District Judge

November 14, 1989

duplicative.

In addition, the alleged conduct of the defendants, even if it occurred, was neither unlawful nor coercive. The purpose of the alleged conspiracy, even if it occurred, was not illegal, illicit or to injure the plaintiff. The acquisition of plaintiff's stock for less than fair market value, even if that be the case, absent some other separate legal wrong, is not itself unlawful, and, indeed, is often the legitimate object of purchasers. The alleged means used by the so-called conspirators was not unlawful. Undisclosed discussions and understandings about the acquisition of the plaintiff's stock, even if they occurred, are not wrong or illegal in themselves. The defendants possessed no "peculiar power of coercion" over the plaintiff which other individuals standing in like relation

would not have had. Nor is there any indication of a malicious intent by the defendants to injure the plaintiff.

Even if the conspiracy claim were not duplicative, and even if there was evidence of unlawful and/or coercive behavior, the claim would nonetheless fail for want of causation. Todd, supra; La Motte, supra; Neustadt, supra; Flemming, supra. The plaintiff says that he sold his stock in Wellman, Inc. on the basis of his own assessment of his financial condition, in order to meet his financial obligations in connection with his own, separate pork processing business. There is no evidence, or even allegation, that the alleged conspiracy caused the sale. As previously noted, the plaintiff's present grievances were known prior to the sale, and his decision to go forward was the sole proximate cause of the sale.

APPENDIX D

Section 548(a) of the Bankruptcy Code, 11 U.S.C. § 548(a), provides as follows:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(1) made such transfer or incurred such obligation with actual intent to hinder, delay,or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than

a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

---

realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes--

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-1403

JOHN G. WELLMAN, SR., as Debtor-in-possession,

Plaintiff - Appellant

v.

ARTHUR O. WELLMAN, JR.; EDWARD R. SACKS; and WELLMAN, INCORPORATED, Successor to Sacks Textile Associates, Incorporated

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for

rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Wilkinson and Judge Nickerson, United States District Judge, sitting by designation.

For the Court,

/S/ John M. Greacen
CLERK

Section 550 of the Bankruptcy Code, 11 U.S.C. § 550, provides as follows:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the curt so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from--

(1) a transferee that takes for

value, including satisfaction or securing of a present or antecedent dept, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit